Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

JERRY JONES, et al.,

Petitioners,

v.

GENERAL ELECTRIC COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The Seventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Indiana's ten (10) year written contract statute of limitations codified in I.C. 34-1-2-6 applies to Plaintiff's alleged breach of the plant closing provisions under a written collective bargaining agreement.

2. Whether the Seventh Circuit Court of Appeals' Opinion Below, in this case, finding Indiana's two (2) year statute of limitations for employment related claims under I.C. 34-1-2-1.5 applies to the alleged violations of the provisions for plant closing under a written collective bargaining agreement, has created incongruous and conflicting holding with the Seventh Circuit Court of Appeals' earlier opinions under *Anderson v. Flexel, Inc.*, 47 F.3d 243 (7th Cir. 1995) and *International Union of Elevator Constructors v. Home Elevator Company*, 798 F.2d 222 (7th Cir. 1986).

3. Whether the Seventh Circuit Court of Appeals' interpretation of this Court's seminal case of *International Union, U.A.A. & A.I. Workers of America (U.A.W., A.F.L.C.I.O.) v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192, is correct in its application to this case where Plaintiffs alleged breach of the plant closing provisions of a written collective bargaining agreement.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The names of all the parties to the proceedings in the Seventh Circuit Court of Appeals are included in the caption, in compliance with Rule 29.1. It is noted that there are no parent companies or subsidiaries of any corporations involved in this matter.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Jerry Jones, et al., respectfully seek a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals in *Jerry Jones, et al. v. General Electric Company,* case number 95-2281, is reproduced in the Appendix at page 2. The opinion of the United States District Court for the Northern District of Indiana, case number 1:95-CV-11-AS, is reproduced in the Appendix at page 13.

BASIS FOR JURISDICTION

This petition for a writ of certiorari seeks review of the Seventh Circuit Court of Appeals judgment of June 24, 1996. Jurisdiction is conferred upon the United States Supreme Court by 28 U.S.C. Section 1254.

STATUTES

The state statutes involved are the Indiana employment related claims statute under I.C. 34-1-2-1.5 and Indiana's ten (10) year statute of limitations based on written contracts under I.C. 34-1-2-2(6) and the accompanying legislative history of these two (2) statutes. Citation to those statutes follows. The statutes are reproduced verbatim in the Appendix beginning at page 19.

Indiana Statute of Limitations

I.C. 34-1-2-1.5 Employment related actions; two year limitation and I.C. 34-1-2-2(6) General Limitations; contracts in writing.

STATEMENT OF THE CASE

On June 11, 1995, a complaint was filed by Plaintiffs, and specifically, by Jerry Jones as representative of a class action lawsuit, in the United States District Court for the Northern District of Indiana, Fort Wayne Division. The lawsuit was primarily predicated on specifically delineated breaches of the plan closing provisions contained within the collective bargaining agreement governing former General Electric Decatur plan employees, through their union, Local 924 of the International Union of Electronic Salaried Machine and Furniture Workers (AFL-CIO) and General Electric Company. Plaintiffs are former Decatur, Indiana General Electric Company employees working at the Decatur plan in Decatur, Indiana, which was closed by General Electric Company ultimately on June 29, 1990. The local union representing Plaintiffs became defunct when the plant closed. Plaintiffs were permitted to bid on jobs at the Fort Wayne, Indiana, General Electric Company facility and were told their seniority would commence as of the date they accepted a Fort Wayne job. All seniority accumulating prior to the date the Decatur employees accepted the Fort Wayne jobs was lost. The collective bargaining agreement in force between General Electric and the union which originally represented the Plaintiffs when they were employed at

the Decatur plan and which was executed on June 27, 1988, provided in pertinent part, as follows:

> "individual re-employed under Section 2D will have seniority for purpose of subsequent layoff, recall, upgrading and other seniority purposes at their new location *based upon the established seniority procedures and practices at their new location.*" (emphasis added).

General Electric Company did not follow the plant closing provisions of the collective bargaining agreement as they pertained to seniority and specifically, to the extent any established seniority procedures and practices existed at the Fort Wayne plant, they did not provide for the endtailing of the Plaintiffs' seniority or service credits. General Electric Company further breached the collective bargaining agreement by disparate treatment of seniority and service credits as between the Plaintiffs and salaried employees who returned to the bargaining unit regardless of membership or non-membership in the union.

General Electric Company filed a motion to dismiss Plaintiffs' class action complaint originally contending that the action was actually a hybrid suit under Section 301 of the Labor and Management Relations Act, 29 U.S.C. Section 189 (necessitating the application of the six (6) month statute of limitations under 29 U.S.C. Section 160(b).

General Electric Company argued in the alternative that Indiana's statute of limitations directed at employment related claims under I.C. 34-1-2-1.5 provided a two (2) year statute of limitation which could be applied.

The United States District Court for the Northern District of Indiana, Fort Wayne Division, held that Indiana's two (2) year statute of limitations under I.C. 34-1-2-1.5 was the most appropriate statute of limitations, "dealing as it does with employment related written contracts". Plaintiffs appealed the District Court's ruling to the United States Court of Appeals for the Seventh Circuit, Chicago Division arguing that Indiana's ten (10) year statute of limitations based on written contracts under I.C. 34-1-2-2(6) should apply to an alleged breach of a written collective bargaining agreement especially where the employment related claims statute expressly states in pertinent part as follows:

> " . . . except actions based upon a written contract . . . "

The Seventh Circuit Court of Appeals held that Plaintiffs' case was sufficiently similar to *International Union of Elevator Constructors v. Home Elevator Company*, 798 F.2d 222 (7th Cir. 1987), applying a two (2) year statute of limitations as to a breach of a collective bargaining agreement and that the principles of stare decisis required adherence to *Home Elevator.*

REASONS FOR GRANTING THE WRIT

A.

The Seventh Circuit Court of Appeals has wrongly interpreted this Court's holding in *International Union, U.A.A. & A.I. Workers of America (U.A.W., A.F.L.C.I.O) v. Hoosier Cardinal Corporation*, 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192, and has created a conflict within its own

holdings in *Home Elevator Company, supra,* and *Anderson v. Flexel,* 47 F.3d 243 (7th Cir. 1995).

The Seventh Circuit Court of Appeals reasoned that *Hoosier Cardinal* stood for the proposition that a collective bargaining agreement is not a written contract when a written contract was applied to claims of an employee who was hired under an oral contract of employment. (Seventh Circuit Opinion, App. page 7).

The Seventh Circuit Court of Appeal's holding in *Home Elevator* is not consistent with this Court's observations in *Hoosier Cardinal.* This Court did not discuss Indiana's two (2) year statute of limitations for employment related claims since the statute had not been enacted at the time *Hoosier Cardinal* was decided in 1966. In *Hoosier Cardinal,* this Court selected Indiana's six (6) year statute of limitations for actions based on contracts not in writing, instead of Indiana's twenty (20) year statute of limitations based on written contracts, which has subsequently changed to a ten (10) year statute of limitations under I.C. 34-1-2-2(6).

The Seventh Circuit in *Home Elevator* noted that:

> "although selection of the Indiana two-year statute of limitations differs from the Supreme Court's decision to apply the six-year statute in *International Union, United Automobile Workers v. Hoosier Cardinal Corp.,* 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966), we have no difficulty with the application of the two-year statute of limitation in this case."

Home Elevator, at 230. However, this Court observed in *Hoosier Cardinal* that:

> "there may of course be Section 301 actions that can only be characterized fairly as based upon a written agreement"

Hoosier Cardinal, at 707. This Court's opinion in *Hoosier Cardinal* does not stand for the proposition that a collective bargaining agreement is not a written contract under the employment related claims statute of limitations which excepts out written contracts, even when an employee is hired under an oral contract of employment. This Court in *Hoosier Cardinal* did reason that even though plaintiff's claims were for vacation pay required under a collective bargaining agreement, the action did not have to be characterized as exclusively based upon a written contract. *Hoosier Cardinal*, at 706.

This Court also stated that for purposes of Section 301 jurisdiction,

> "we have rejected the view that a suit such as this is based solely upon separate hiring contracts, frequently oral, between the employer and each employee."

In essence, this Court in *Hoosier Cardinal* held that the cause of action was not solely predicated on either a written collective bargaining agreement or an oral contract for hire. This Court held that:

> "it does not follow however that the separate contracts of employment (oral contracts for hire) may not be taken into account in characterizing the nature of the specific suit for purposes of selecting the appropriate statute of limitations provision."

Id. at 706. At the time *Hoosier Cardinal* was decided, Indiana had a twenty (20) year statute of limitations for

written contracts which was seemingly too lengthy to fulfill the policies behind labor relation claims and therefore, this Court selected the six (6) year statute of limitations for oral contracts.

The Seventh Circuit Court of Appeals has extrapolated this reasoning of *Hoosier Cardinal* to conclude that for purposes of the Indiana employment related claims statute, which expressly excepts out written contracts, a collective bargaining agreement is not a written contract.

The Seventh Circuit Court of Appeals' interpretation of Indiana's two (2) year employment related contract statute of limitations leaves an illogical precedent to be followed. The language which states "except actions based upon a written contract" would be eviscerated and have no application whatsoever, and the statute would include all causes of action in the employment realm irrespective of whether the claim was predicated on a written contract. The holding also leaves no clear direction as to when an employment related cause of action predicated on breaches of a written agreement would *not* come within the purview of the statute.

The clear legislative intent was to provide a ten (10) year statute of limitations for all causes of action based on written contracts within the employment realm, otherwise, the language excepting out written contracts would not have been inserted by the House judiciary committee and ultimately passed. The Seventh Circuit Court of Appeals' interpretation leaves the issue subject to anomalous result.

This Court in its foresight for the future further reasoned in *Hoosier Cardinal* that:

> "there may of course be [Section] 301 actions that can only be *fairly characterized* as based exclusively upon a written agreement . . . " (emphasis added).

Hoosier Cardinal, 383 U.S. at 707.

A conflict exists between the Seventh Circuit Court of Appeals holdings in *Home Elevator* and *Anderson v. Flexel.*

In *Home Elevator,* suit was brought by the union itself rather than by individual employees and the issue was whether or not the lawsuit constituted a hybrid Section 301 suit requiring the application of the six (6) months statute of limitations provided and recited at 29 U.S.C. Section 160(b) and *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151, 76 L.Ed.2d 476, 103 S.Ct. 2281 (1983).

In *Home Elevator,* the plaintiff union alleged that the employer violated the collective bargaining agreement by not paying certain wage rates established by the agreement and sought damages under Section 301 for breach of contract. The Seventh Circuit acknowledged the fact that Indiana's two (2) year statute of limitations for suits involving terms, conditions and privileges of employment includes the phrase "except actions based on written contract" but nonetheless, concluded that the two (2) year period should apply as "the most analogous in Indiana's statutory scheme" for actions which contain the basic allegation that a company breached a collective bargaining agreement. (Seventh Circuit Opinion, App. page 7).

However, the Seventh Circuit Court of Appeals in *Anderson v. Flexel, Inc.*, 47 F.3d 243, agreed with the application of Indiana's ten (10) year statute of limitations under I.C. 34-1-2-2(6) to a claim based upon a written collective bargaining agreement, group life insurance provisions, and an oral contract for hire. In *Anderson v. Flexel*, plaintiff's husband Harold was employed under an oral contract for hire but his relation to Flexel was based on a written collective bargaining agreement. The District Court for the Central District of Illinois in *Anderson* held that Indiana's ten (10) year statute of limitations for actions based on a written contract applied. *Id.* at 247. In *Anderson*, prior to trial Flexel argued that Indiana's two (2) year statute of limitations for employment related claims barred plaintiff's action and the District Court denied Flexel's motion to dismiss on November 9, 1993, and held that:

> "because Harry's relation to Flexel was based upon a written collective bargaining agreement and a written group life insurance, Indiana's ten (10) year statute of limitations for actions based on written contracts applied I.C. 34-1-2-2(6) and that therefore, Emma's claims were not time barred."

Anderson, 47 F.3d at 247.

In the instant case, Plaintiffs' claims were not brought by the union and were solely based upon the written collective bargaining agreement. Both Harry Anderson and the Plaintiffs were hired under oral contracts for hire but maintained their cause of action for breach of provisions of written collective bargaining agreements. The fact that Anderson sought relief under

the Employment Retirement Income and Securities Act for breach of a written collective bargaining agreement does not change the character of the cause of action which rests squarely on the written collective bargaining agreement, insurance provisions, and an oral contract for hire.

The incongruent opinions rendered in *Home Elevator* and *Anderson v. Flexel* provide the basis for this Court to grant this Petition for Writ of Certiorari.

B.

The Seventh Circuit Court of Appeals has misapplied Indiana's two (2) year statute of limitations for employment related claims to the instant cause of action where the statute expressly excepts out actions based upon a written contract.

The legislative history of Indiana's two (2) year statute of limitations for employment related claims makes it abundantly clear that the legislature did not intend that actions based upon a written contract should come within the purview of the two (2) year statute of limitations.

The genesis of I.C. 34-1-2-1.5 is House Bill 1925 which was proposed in conjunction with several other bills concerning the limitations on actions, including written contracts. The House version of the Bill was passed originally by the Indiana House of Representatives and did not include the language "except actions based upon a written contract". The Bill went to the judiciary committee and then to the Senate with the recommendation that the Bill be amended as follows:

> "page 1, line 3, after 'employment' insert in roman 'except actions based upon a written contract' . . . and when so amended that said bill do pass."

(House Bill 1925, Legislative History, App. page 27). It is clear from a review of the legislative history of House Bill 1925, that the judiciary committee recommended that the language "except actions based upon a written contract" be included to comport with the general contract statute of limitation numbered "Sixth" on page 2 of the Digest of House Bill 1925. (House Bill 1925 Digest, App. page 22).

To clarify this intent, the Senate subsequently amended House Bill 1925 to add "except actions based upon a written contract" so as to be consistent and unambiguous with respect to the statute of limitations on written contracts. This interpretation comports with Judge Harold Baker's ruling in *Anderson v. Flexel, supra,* denying the defendant's motion to dismiss Anderson's claim pursuant to the two (2) year statute of limitations for employment related claims. It is anomalous and seemingly disingenuous to submit that a collective bargaining agreement is not a written contract of employment.

In *Anderson v. Flexel,* Judge Baker in the District Court of Central District of Illinois logically reasoned that Indiana's ten (10) year statute of limitations did apply to an alleged breach of a collective bargaining agreement which contained insurance provisions for the benefit of employees where Indiana's two (2) year statute of limitations for employment related claims expressly excepted out written contracts. The Seventh Circuit Court of Appeals in its review did not disagree with the reasoning of the District Court for the Central District of Illinois'

application of a ten (10) year statute of limitations to the collective bargaining agreement and an oral contract for hire. (Seventh Circuit Opinion, App. page 10).

The Seventh Circuit stated in the instant case that:

> "Moreover, in *Anderson*, we expressly stated that '[w]hile we might be inclined to find' that the two-year statute of limitations applied in such cases, we did not even consider the issue because the defendant employer had waived the defense. *Id. Anderson*, therefore, has no bearing on the issue before us."

(Seventh Circuit Opinion, App. page 10). It must be noted that the two (2) year statute of limitations the Seventh Circuit referred to in *Anderson* was *not* Indiana's two (2) year statute of limitations for employer related claims but a forfeiture[s] of penalty given by statute under I.C. 34-1-2-2(1). The Seventh Circuit in its opinion in the case at bar did not mean to imply that it was inclined to find that the two (2) year statute of limitations for employment related claims might have applied had not the employer waived the defense.

The holding in *Anderson* must be considered in the context of the instant case and has led to incongruent opinions on this issue that this Court is empowered to resolve, and the two (2) year statute of limitations for employment related claims should not have been applied to the facts of the instant case.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari to the Seventh Circuit Court of Appeals should be granted and this Court should consider the interpretation given to its holding in *Hoosier Cardinal* by the Seventh Circuit and its application of Indiana's two (2) year employment related statute of limitations to the facts of this case and finally, the incongruent opinions of *Anderson* and *Home Elevator.*

September 23, 1996

Respectfully submitted,

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United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: June 24, 1996

BEFORE:

Honorable Richard A. Posner, Chief Judge

Honorable Harlington Wood, Jr., Circuit Judge

Honorable Terence T. Evans, Circuit Judge

No. 95-2281

JERRY JONES,

Plaintiff - Appellant

v.

GENERAL ELECTRIC COMPANY,

Defendant - Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division No. 95 C 11, Allen Sharp, Chief Judge

In judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 95-2281

JERRY JONES,

Plaintiff-Appellant,

v.

GENERAL ELECTRICT COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, Fort Wayne Division.
No. 95 C 11 – **Allen Sharp,** *Chief Judge.*

ARGUED DECEMBER 6, 1995 – DECIDED JUNE 24, 1996

Before POSNER, *Chief Judge,* and HARLINGTON WOOD, JR., and EVANS, *Circuit Judges.*

HARLINGTON WOOD, JR., *Circuit Judge.* Jerry Jones, as the representative of a group of employees of the General Electric Company's Decatur, Indiana plant, appeals the dismissal of his complaint which sought enforcement of plant closing provisions of a collective bargaining agreement under § 301 of the Labor and Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185. Because we find the applicable statute of limitations makes the suit

untimely, we affirm the district court's dismissal of the complaint.

I. BACKGROUND

Plaintiff-appellant Jerry Jones brought this case on behalf of a group of former employees of defendant-appellee General Electric's plant in Decatur, Indiana. While at that location, the employees were members of Local 924 of the International Union of Electronic Salaried Machine and Furniture Workers, and were employed under the terms of a collective bargaining agreement in effect from 1988-1991. When the Decatur plant was closed in March of 1989, its former employees were permitted to bid on jobs at General Electric's Fort Wayne, Indiana plant. Plaintiff alleges that they were "told that their seniority and accompanying service credits would start when they commenced work at the Fort Wayne plant," and that the collective bargaining agreement then in force provided that individuals re-employed at a new plant location would have seniority and service credits pursuant to any existing practices and procedures at the new location.

Upon joining the Fort Wayne plant, however, the group discovered that their seniority and service credits accumulated at the Decatur plant had been lost. This was allegedly due to the methods (or lack thereof – the record is unclear) used at the Fort Wayne plant for "endtailing" seniority and service credits. Since no special agreement had been negotiated by the employer and unions concerning plant closing procedures, Jones asserts that these

"endtailing" methods violated the terms of the collective bargaining agreement.

Jones alleges the group filed a grievance to restore the lost seniority, and that some former employees filed a complaint with the National Labor Relations Board in June of 1991. While the complaint to the NLRB was dismissed as untimely, the resolution of the grievance is not stated in the record. Jones asserts, however, that all such dispute resolution avenues have been exhausted. Jones also argues that his local union became "defunct" with the closing of the Decatur plant, and that any duty of the union to represent the group was therefore dissolved.

Jones and fellow plaintiffs filed this suit on January 11, 1995, claiming several breaches of the collective bargaining agreement in violation of § 301 of the LMRA. They also requested that their cause be certified as a class action under Fed. R. Civ. P. 23. Defendants responded with a motion to dismiss under Fed. R. Civ. P. 12(b)(6), claiming the complaint was filed beyond the applicable statute of limitations.

The district court granted defendant's motion to dismiss, applying Indiana's two-year statute of limitations for employment-related contract actions, Ind. Code § 34-1-2-1.5. The motion to proceed as a class action was denied as moot. Jones appeals on the sole ground that their claim should be subject to Indiana's ten-year statute of limitations for written contract actions, Ind. Code § 34-1-2-2(6).

II. STANDARD OF REVIEW

We review statute of limitations determinations *de novo*. *Anderson v. Flexel, Inc.*, 47 F.3d 243, 247 (7th Cir. 1995). Dismissal of a complaint is appropriate only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations in the complaint. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). We accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff. *Dawson v. General Motors Corp.*, 977 F.2d 369, 372 (7th Cir. 1992).

III. DISCUSSION

Claims asserted under § 301 of the LMRA are not governed by a specific statute of limitations, and therefore courts reviewing claims under that section must borrow an appropriate limitations period. When federal statutes are silent as to limitations periods, federal courts usually borrow the most closely analogous statute of limitations from state law. *See Int'l Union, United Auto. Workers of Am. v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966). A narrow exception to this standard borrowing rule exists when analogous state statutes of limitations would frustrate or significantly interfere with the implementation of national policies or would be at odds with the purpose or operation of federal substantive law. *North Star Steel Co. v. Thomas*, 115 S. Ct. 1927, 1930-31 (1995) (internal citations omitted).

The question of what time limits apply to § 301 actions is not a new one to this court. The question

admits of several answers, however, depending on various contextual factors. To summarize briefly, in so-called "hybrid" cases involving claims against both the employer for breach of contract and against the union for a breach of its duty of fair representation, the Supreme Court has held that federal law provides a six-month time limit in accordance with § 10(b) of the National Labor Relations Act. 29 U.S.C. § 160(b); *see DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983). Such "hybrid" cases, which implicate federal labor law and important national policies, invoke the "narrow exception" and are to be distinguished from "straightforward" § 301 cases. For cases of the latter type, borrowing an applicable state statute of limitations for breach of contract remains the rule. Indiana law provides three possible limitations periods. For contracts not in writing, six years are allowed. Ind. Code § 34-1-2-1. For "[a]ll actions relating to the terms, conditions, and privileges of employment except actions based upon a written contract (including, but not limited to, hiring or the failure to hire, suspension, discharge, discipline, promotion, demotion, retirement, wages, or salary)," two years is the applicable limit. Ind. Code § 34-1-2-1.5. Finally, for all other contract actions, suit must be brought within ten years. Ind. Code § 34-1-2-3.

We mention these various limitation periods because all of them have been raised in this case. As an initial matter, the parties dispute whether this action should be characterized as a "hybrid" suit, with the defendant asserting that a claim should have been brought against the union. The plaintiff argues, however, that with the Decatur plant's closure his union became "defunct" and

thus had no duty to represent him. For reasons that will become apparent below, we find it unnecessary to unravel this issue. For purposes of argument, we may assume, as the parties do, that one of the longer Indiana statutory periods governs. The defendant argues, as the district court found, that the two-year limit for employment-related actions applies on the basis of *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1986). The plaintiff counters that the correct limitation period is the general ten-year limit for contracts in writing.

In *Home Elevator,* we held that Indiana's two-year statute of limitations applies to § 301 cases brought to enforce contractual obligations contained in a collective bargaining agreement. In that case, the plaintiff union discovered that the defendant employer had not paid its employees certain wage rates established by a collective bargaining agreement. In its complaint, the union alleged that the employer had violated the agreement and therefore sought specific performance and damages under § 301 for breach of contract. *Id.* at 224. Acknowledging that Indiana's two-year statute of limitations for suits involving terms, conditions, and privileges of employment includes the phrase "except actions based on a written contract," we nonetheless concluded that for actions in which "the basic allegation . . . is that a company breached the collective bargaining agreement," *id.* at 227, the two-year period would apply as the most analogous in Indiana's statutory scheme.

Our holding in *Home Elevator* was supported by two rationales. First, we noted that, consistent with the Supreme Court's observations in *Hoosier Cardinal,* 383

U.S. at 706, because the separate hiring contracts (separate from the collective bargaining agreement, and normally unwritten) between the employer and each employee were essential for both establishing the actual breach and for determining the extent of damages, "this sort of section 301 action is not entirely based on a written contract." *Home Elevator,* 798 F.2d at 230 and n.9. Second, we found that the two-year period was also consistent with federal labor policy which encourages the rapid resolution of labor disputes and contractual agreements to submit grievances to arbitration. *Id.*

We find this case very similar to *Home Elevator,* which has been the law in such actions for ten years. Plaintiff neither cites nor addresses *Home Elevator* in his main brief, even though *Home Elevator* was the basis upon which the district court granted the motion for dismissal. In any event plaintiff's belated or implied attempts to distinguish *Home Elevator* are unpersuasive. Plaintiff's complaint alleged only violations of the collective bargaining agreement ("the Plaintiffs' claims are squarely predicated on a breach of the plant closing provisions of the Collective Bargaining Agreement"), and asserted at several points that he was "told" that his seniority and related benefits would continue. So far, these facts seemingly put the case squarely within the confines of *Home Elevator.* Plaintiff advances two arguments to differentiate his case, however. We address these in turn.

First, plaintiff attached a one-page letter to his complaint which describes a revision to the addressee's (not the plaintiff's) "IUE Seniority Date." Plaintiff asserts that a similar letter was "apparently" sent to all affected employees, and argues that it remains to be determined

whether that letter constitutes a "written contract- . . . which would render the [two-year] statute of limitations . . . inapplicable." He cites *Majd Pour v. Basic Am. Medical, Inc.*, 555 N.E.2d 155 (Ind. Ct. App. 1990), for the proposition that the shorter limitations period "is applicable *only* when the action relates to a term, condition, or privilege of employment based on an oral contract of employment." *Id.* at 161. This holding is taken out of context and ignores other cases, discussed above, which apply the limitations period more broadly. *Majd Pour* did not involve a § 301 claim or a collective bargaining agreement, and discussed the appropriate statute to apply to a specific written employment contract between an individual employee and a corporate health provider.

Even construing the letter plaintiff offers in this case in his favor, as we must, we cannot see how this would constitute a written contract, let alone one that would justify the substitution of a catch-all, ten-year statute of limitations over the two-year limit specifically reserved for employment-related actions. Indiana law requires a contract of employment to contain four terms: 1) the place of employment; 2) the period of employment; 3) the nature of the service the employee is to render; and 4) the compensation the employee is to receive. *Majd Pour v. Basic Am. Medical, Inc.*, 512 N.E.2d 435, 439 (Ind. Ct. App. 1987). This letter, not even addressed to the plaintiff, does not meet these criteria. The letter itself appears to only clarify certain seniority rights, and these are apparently limited to the employee's status within the union, not directly vis-a-vis the employer. Indeed, the letter states that the revision it describes "applies only to your IUE Seniority Date and does not apply to your Continuity of

Service Date with GE. Your Continuity of Service Date is used to determine your eligibility for vacation pay, sick pay, Income Extension Aid, and other Company benefits." Plaintiff did not argue in the district court why the letter might form a written contract, and gives us no further guidance here. We see no reason why the letter should justify a longer statute of limitations.

Second, and related to his first argument, plaintiff asserted at oral argument that the collective bargaining agreement, together with the letter mentioned above, mandates the approach of *Anderson v. Flexel, Inc.*, 47 F.3d 243 (7th Cir. 1995), in place of *Home Elevator.* In *Anderson,* we held that Indiana's ten-year statute of limitations applied in place of the two-year limit in a case involving a collective bargaining agreement together with a written group life insurance policy. *Id.* at 247. Yet *Anderson* was an ERISA case, and an insurance contract is much more substantial than the one-page clarification letter plaintiff offers here. Moreover, in *Anderson* we explicitly stated that "[w]hile we might be inclined to find" that the two-year statute of limitations applied in such cases, we did not even consider the issue because the defendant employer had waived the defense. *Id. Anderson,* therefore, has no bearing on the issue before us.

We find that this case is sufficiently similar to *Home Elevator* to require the application of Indiana's two-year statute of limitations. Aside from familiar principles of stare decisis requiring adherence to *Home Elevator,* we also note that the policy rationales expressed in that case are of continuing relevance and persuasiveness. We see little reason, at least in the circumstances of this case, to apply a ten-year statute of limitations to a collective

bargaining agreement in effect toward these plaintiffs for only one year. Plaintiff concedes that if the shorter two year limitation period applies, his suit is untimely. The district court's order dismissing the case is accordingly

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States District Court

Northern District of Indiana

JERRY JONES

JUDGMENT IN A CIVIL CASE

v.

Case No. 1:95-CV-11 AS

GENERAL ELECTRIC COMPANY

[ ] **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED BY THE HONORABLE ALLEN SHARP that the defendant's motion to dismiss is granted. Plaintiff's motion to proceed as a class action is DENIED as moot. Case is DISMISSED. Each party is to bear its own costs.

This document entered pursuant to Rules 79(A) and 58 of the Federal Rules of Civil Procedure on:

April 26, 1995

Geraldine J. Crockett

By /s/ Shirley Paulson
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

JERRY JONES, et al.,	)	
	)	
Plaintiff,	)	No. 1:95-cv-11 AS
v.	)	
GENERAL ELECTRIC COMPANY,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

I. Background

Plaintiffs were employees at G.E.'s plant in Decatur, Indiana until it closed in March, 1989. The Decatur plant employees were allowed to bid on new positions at G.E.'s Fort Wayne facility, but lost any seniority accumulated at the Decatur plant. Plaintiffs allege in their response to the motion to dismiss that they filed a grievance to restore the lost seniority, and that they filed a complaint with the National Labor Relations Board, but were given no relief.

Plaintiffs filed this cause on January 11, 1995, alleging breach of a collective bargaining agreement and requesting certification as a class action under Fed.R.Civ.P. 23. The defendant ("G.E.") filed its motion to dismiss under Fed.R.Civ.P. 12(b)(6) on March 3, 1995, asserting that plaintiffs had filed their complaint beyond the applicable statute of limitation. Both parties have fully briefed the issue, and this court is now ready to rule.

II. Analysis

By moving under Fed.R.Civ.P. 12(b)(6) for dismissal, the defendant asserts that even assuming the plaintiff's allegations are true, the complaint fails to state a claim upon which relief can be granted. This rule contains only one of several "filters" used by the courts to separate "those suits that should receive plenary consideration from those that should not." *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1039 (7th Cir. 1987). The rule's capacity to save the parties' and the court's resources is obvious.

However, this court must be especially careful when faced with a motion for dismissal. The court should accord the plaintiff's complaint a reasonably tolerant reading, because

> the dismissal of the suit under 12(b)(6) could preclude another suit based on any theory that the plaintiff might have advanced on the basis of the facts giving rise to the first action.

Id. (citing, *American Nurses' Association v. State of Illinois*, 783 F.2d 716, 726-27 (7th Cir. 1986)). *See also, Wright v. Bosch Trucking Co.*, 804 F.Supp. 1069, 1071 (C.D.Ill. 1992); *Stewart v. RCA Corp.*, 790 F.2d 624, 632 (7th Cir. 1986). As stated by the *Stewart* court, a complaint "almost barren of facts" may comprise claims of a specific category if read liberally. *Stewart*, 790 F.2d at 632.

Dismissal of a complaint is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). *See also,*

Dawson v. General Motors Corp., 977 F.2d 369, 372 (7th Cir. 1992). This court must accept the well-pleaded factual allegations of the complaint as true and "construe such allegations in favor of the plaintiff." *Roots Partnership v. Lands' End, Inc.*, 965 F.2d 1411, 1416 (7th Cir. 1992). As a point of clarification, the court notes that it is required to accept only factual allegations; "it is not required to accept legal conclusions that may be alleged or that may be drawn from the pleaded facts." *Milwaukee v. Saxbe*, 546 F.2d 693, 704 (7th Cir. 1976); *see also, Reichenberger v. Pritchard*, 660 F.2d 280, 282 (1981).

To escape dismissal "[a] plaintiff need not set out in detail the facts upon which a claim is based, but must allege sufficient facts to outline the cause of action." *Marmon Group, Inc. v. Rexnord, Inc.*, 822 F.2d 31, 34 (7th Cir. 1987) (citations omitted). "The complaint cannot be amended by the briefs filed by the plaintiff in opposition to a motion to dismiss." *Gomez*, 811 F.2d at 1039.

Likewise, the defendant may not "attempt to refute the complaint or to present a different set of allegations" in its 12(b)(6) challenge. *Id.* The defendant's attack must be against the sufficiency of the complaint; it "must demonstrate that the plaintiff's claim, as set forth by the complaint, is without legal consequence." *Id.*

Plaintiffs assert that this is a simple breach of contract action, and thus, under Indiana Code (I.C.) § 34-1-2-2(6), the applicable statute of limitations would be ten years. G.E. first contends that the action is actually a hybrid suit under § 301 of the Labor Management Relations Act (29 U.S.C. § 185), containing both the breach of contract issue against G.E. and a breach of fair

representation claim against plaintiffs' union. If the action is of that type, then under *DelCostello v. Teamsters*, 462 U.S. 151 (1983), a six month statute of limitations would apply pursuant to 29 U.S.C. § 160(b).

However, this court need not determine that question, because as G.E. correctly points out, Indiana has passed a statute of limitations dealing directly with employment-related contract actions, I.C. § 34-1-2-1.5, which provides a two year limitations period for those actions. In *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1986), the Seventh Circuit found that I.C. § 34-1-2-1.5 was the most appropriate statute of limitations to use where a union was suing the employer for breach of contract. Although in this case, plaintiffs are employees/union members, and not the union itself, it still seems to this court that I.C. § 34-1-2-1.5 is the correct statute of limitations to apply, dealing as it does with employment-related written contracts. Unfortunately for plaintiffs, application of I.C. § 34-1-2-1.5 renders their complaint time-barred, as the latest activity in this action occurred in 1991, well more than two years ago.

IV. Conclusion

This court therefore finds that this cause is time-barred by the applicable statute of limitations, **GRANTS** G.E.'s motion to dismiss and **DISMISSES** the case. Plaintiff's motion to proceed as a class action is **DENIED** as moot. Each party is to bear its own costs.

IT IS SO ORDERED.

Dated: April 25, 1995

/s/ Allen Sharp
CHIEF JUDGE
NORTHERN DISTRICT
OF INDIANA

34-1-2-1.5 Employment related actions; two year limitation

Sec. 1.5. All actions relating to the terms, conditions, and privileges of employment except actions based upon a written contract (including, but not limited to, hiring or the failure to hire, suspension, discharge, discipline, promotion, demotion, retirement, wages, or salary) shall be brought within two (2) years of the date of the act or omission complained of. *As added by Acts 1977, P.L.328, SEC.1.*

CIVIL CODE

34-1-2-2 GENERAL LIMITATIONS

Sec. 2. The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards:

(1) For injuries to person or character, for injuries to personal property, and for a forfeiture of penalty given by statute, within two (2) years.

(2) All actions against a sheriff, or other public officer, or against such officer and his sureties on a public bond, growing out of a liability incurred by doing an act in an official capacity, or by the omission of an official duty, within five (5) years; but an action may be brought against the officer or his legal representatives, for money collected in an official capacity, and not paid over, at any time within six (6) years.

(3) For the recovery of real property sold on execution, brought by the execution-debtor, his heirs or any person claiming under him, by title acquired after the date of the judgment, within six (6) years after the sale. However, an action described in this clause must be commenced within ten (10) years after the sale, if the sale occurred before September 1, 1982.

(4) For the recovery of real property sold by executors, administrators, guardians or commissioners of a court, upon a judgment, specifically directing the sale of property sought to be recovered, brought by a party to the judgment, his heirs, or any person claiming a title under a party, acquired after the date of the judgment, within five (5) years after the sale is confirmed.

(5) Upon promissory notes, bills of exchange and other written contracts for the payment of money executed on or after September 19, 1881, and before September 1, 1982, within (10) years; and upon promissory notes, bills of exchange, or other written contracts for the payment of money executed after August 31, 1982, within six (6) years. However, all such contracts as have been executed before September 19, 1881, may be enforced under this article, within such time only as they have to run, before being barred under the existing law in effect at the time of their executions limiting the commencement of actions, and not afterward.

(6) Upon contracts in writing other than those for the payment of money, and including all mortgages other than chattel mortgages, deeds of trust, judgments of courts of record and for the recovery of the possession of real estate, within ten (10) years. However, upon contracts in writing other than those for the payment of money entered into before September 1, 1982, not including chattel mortgages, deeds of trust, judgments of courts of record, or for the recovery of the possession of real estate, the action must be commenced within twenty (20) years. *As amended by Acts 1981, P.L.270, SEC.2.*

Construction with Conflicting Provisions

Acts 1963, c. 317, s. 10-102(4) [now, section 26-1-10-102(4)] provides:

"To the extent that Sections 37 and 38 of Chapter 38 of the Acts of 1881 (Spec. Sess.) and Chapter 301 of the Acts of 1951 [now, section 34-1-2-1 and this section] prescribing statutes of limitations, are inconsistent with section 2-725 of this Act [now, section 26-1-2-725], such sections are hereby repealed."

HOUSE BILL 1925

INTRODUCED BY

Repr Coldren

Bell

read first time and referred:

JUDICIARY

DIGEST

Amends IC 34-1-2, the statute of limitations, to add a new provision establishing a one year limit on actions arising from employment contracts.

A BILL FOR AN ACT to amend IC 34-1-2 concerning the limitations on actions.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF INDIANA:

SECTION 1. IC 34-1-2-2 is amended to read as follows: The following actions shall be commenced within the periods herein proscribed after the cause of action has accrued, and not afterwards.

First, For injuries to person or character, for injuries to personal property, and for a forfeiture of penalty given by statute, within two (2) years: Provided, That actions on account of injuries to personal property which occurred prior to ~~the effective date of this mandatory act~~ *March 7, 1951,* shall be commenced within two (2) years from ~~the effective date of this mandatory act~~ *March 7, 1951.*

Second, All actions against a sheriff, or other public officer, or against such officer and his sureties on a public bond, growing out of a liability incurred by doing an act in an official capacity, or by the omission of an official duty, within five (5) years; but an action may be brought against the officer or his legal representatives, for money collected in an official capacity, and not paid over, at any time within six (6) years.

Third, For the recovery of real property sold on execution, brought by the execution-debtor, his heirs or any person claiming under him, by title acquired after the date of the judgment, within ten (10) years after the sale.

Fourth, For the recovery of real property sold by executors, administrators, guardians or commissioners of a court, upon a judgment, specifically directing the sale of property sought to be recovered, brought by a party to the judgment, his heirs, or any person claiming a title under a party, acquired after the date of the judgment, within five (5) years after the sale is confirmed.

Fifth, Upon promissory notes, bills of exchange and other written contracts for the payment of money hereafter executed, within ten (10) years; Provided, That all such contracts as have been heretofore executed may be enforced under this act, within such time only as they have to run, before being barred under the existing law limiting the commencement of actions, and not afterward.

Sixth, Upon contracts in writing other than those for the payment of money within twenty (20) years; Provided, however, That upon all mortgages other than mortgages defined and enumerated by Chapter 147 of the Acts of 1935, and upon deeds of trust, on Judgments of

courts of record and for the recovery of the possession of real estate, within ten (10) years: Provided, That as to all such mortgages and deeds of trust executed and judgments of courts of record and causes of action for the recovery of the possession of real estate accrued prior to ~~the effective date of this mandatory act~~ *March 7, 1951,* the time in which actions shall be commenced thereon shall be the same as if ~~this mandatory act~~ *Acts 1951, Chapter 301* had not become law.

Seventh: All actions relating to the terms, conditions, and privileges of employment (including, but not limited to, hiring or the failure to hire, suspension, discharge, discipline, promotion, demotions, retirement, wages or salary) shall be brought within one (1) year.

February 4, 1977.

PRINTING CODE – The parts in this style type are additions to the text of the existing section of the law. The parts in ~~this style type~~ are deletions from the text of the existing section of the law. The absence of either of the above type styles in an amendatory SECTION indicates that an entirely new section or chapter is to be added to the existing law.

DIGEST

Amends IC 34-1-2, the statute of limitations, to add a new provision establishing a one year limit on actions arising from employment contracts.

HOUSE BILL No. 1925

A BILL FOR AN ACT to amend IC 34-1-2 concerning the limitations on actions.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 34-1-2 is amended by adding a NEW section 1.5 to read as follows: Sec. 1.5. All actions relating to the terms conditions, and privileges of employment (including, but not limited to, hiring or the failure to hire, suspension, discharge, discipline, promotion, demotion, retirement, wages, or salary) shall be brought within two (2) years of the date of the act or omission complained of.

COMMITTEE REPORT

Mr. Speaker: Your Committee on Judiciary, to which was referred House Bill 1925, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill be amended as follows:

Strike everything after the enacting clause and insert in lieu thereof the following:

(SEE TEXT OF BILL)

and when as amended that said bill do pass.

DONALDSON, Chairman

HOUSE BILL No. 1925

A BILL FOR AN ACT to amend IC 34-1-2 concerning the limitations on actions.

Coldren, Bell

January 24, 1977, read first time and referred to Committee on Judiciary.

February 3, 1977, Amended, reported favorably – Do Pass.

ENGROSSED
HOUSE BILL No. 1925

A BILL FOR AN ACT to amend IC 34-1-2 concerning the limitations on actions.

Coldren, Bell
(SENATE SPONSORS – DUVALL, PETERSON)

January 24, 1977, read first time and referred to Committee on Judiciary.

February 3, 1977, Amended, reported favorably – Do Pass.

February 7, 1977, read second time, Ordered Engrossed. Engrossed.

February 9, 1977, read third time, Passed. Yeas 70, Nays 22.

SENATE ACTION

March 18, 1977, read first time and referred to Committee on Judiciary.

March 28, 1977, Amended, reported out – Do Pass.

COMMITTEE REPORT

Mr. President: Your Committee on Judiciary, to which was referred House Bill 1925, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be amended as follows:

Page 1, line 3, after "employment" insert in roman "except actions based upon a written contract".

and when so amended that said bill do pass.

(Reference is made to printed bill dated February 4, 1977.)

CARROLL, Chairman

COMMITTEE REPORT

Mr. Speaker: Your Committee on Judiciary, to which was referred House Bill 1925, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill be amended as follows:

Strike everything after the enacting clause and insert in lieu thereof the following:

(SEE TEXT OF BILL)

and when so amended that said bill do pass.

DONALDSON, Chairman

March 29, 1977.

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DIGEST

Amends IC 34-1-2, the statute of limitations, to add a new provision establishing a one year limit on actions arising from employment contracts.

ENGROSSED
HOUSE BILL No. 1925

A BILL FOR AN ACT to amend IC 34-1-2 concerning the limitations on actions.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 34-1-2 is amended by adding a NEW section 1.5 to read as follows: Sec. 1.5. All actions relating to the terms, conditions, and privileges of employment *except* actions based upon a written contract (including,

but not limited to, hiring or the failure to hire, suspension, discharge, discipline, promotion, demotion, retirement, wages, or salary) shall be brought within two (2) years of the date of the act or omission complained of.

First Regular Session 100th General Assembly

PRINTING CODE – The parts in this style type are additions to the text of the existing section of law. The parts in ~~this style type~~ are deletions from the text of the existing section of the law. The absence of either of the above type styles in an amendatory SECTION indicates that an entirely new section or chapter is to be added to the existing law.

HOUSE ENROLLED ACT No. 1925

AN ACT to amend IC 34-1-2 concerning the limitations on actions.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 34-1-2 is amended by adding a NEW section 1.5 to read as follows: Sec. 1.5. All actions relating to the terms, conditions, and privileges of employment except actions based upon a written contract (including, but not limited to, hiring or the failure to hire, suspension, discharge, discipline, promotion, demotion, retirement,

wages, or salary) shall be brought within two (2) years of the date of the act or omission complained of.

President of Senate

Speaker of House of Representatives

Approved:

Governor of the State of Indiana

AI-179

GENERAL INDEX

Authored by REPRESENTATIVE COLDREN
Sponsored by SENATORS DUVALL AND PETERSON
Employment contract: sets two-year statute of limitations on actions from (34-1-2)

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Public Law 328

January 24, 1977

INTRODUCTION OF BILLS

HB 1925 – COLDREN and BELL (Judiciary)

A BILL FOR AN ACT to amend IC 34-1-2 concerning the limitations on actions.

COMMITTEE REPORT

Mr. Speaker: Your Committee on Judiciary, to which was referred House Bill 1925, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill be amended as follows:

Strike everything after the enacting clause and insert in lieu thereof the following:

SECTION 1. IC 34-1-2 is amended by adding a NEW section 1.5 to read as follows: Sec. 1.5. All actions relating to the terms, conditions, and privileges of employment (including, but not limited to, hiring or the failure to hire, suspension, discharge, discipline, promotion, demotion, retirement, wages, or salary) shall be brought within two (2) years of the date of the action or omission complained of.

and when so amended that said bill do pass.

DONALDSON, Chairman

Report adopted.

HOUSE BILLS ON SECOND READING

The following bills were handed down by the Speaker, read a second time by title and, there being no amendment, were ordered engrossed:

House Bills 1231, 1239, 1307, 1435, 1533, 1561, 1699, 1701, 1704, 1760, 1837, 1889, 1913, 1925, 2090, 2106.

House Bill 1335 was read a second time.

HOUSE MOTION

Mr. Speaker: I move that House Bill 1335 be amended as follows:

Page 1, line 14, reset "credible" in roman.

Page 1, line 14, delete "including multiple hearsay".

February 9, 1977

House Bill 1925

A BILL FOR AN ACT to amend IC 34-1-2 concerning the limitations on actions.

The bill was read a third time by sections and placed upon its passage. The question was, Shall the bill pass? The roll was called.

Roll Call 146: Yeas 70, nays 22.

The bill was declared passed. The question was, Shall the title of the bill remain the title of the act? There being no objection, it was so ordered.

The Clerk was directed to inform the Senate of the passage of the bill. Senate sponsors: Senators Duvall and Peterson.

February 14, 1977

MESSAGE FROM THE HOUSE

Mr. President: I am directed by the House to inform the Senate that the House has passed Engrossed House Bills 1103, 1204, 1239, 1307, 1498, 1533, 1561, 1589, 1622, 1670, 1770, 1904, 1925, 1978, 1995, 2090 and 2106 and the same are herewith transmitted to the Senate for further action.

SHARON THUMA
Clerk of the House

March 18, 1977

EHB 1925 – DUVALL and PETERSON (Judiciary)

A BILL FOR AN ACT to amend IC 34-1-2 concerning the limitations on actions.

March 28, 1977

COMMITTEE REPORT

Mr. President: Your Committee on Judiciary, to which was referred House Bill 1925, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be amended as follows:

Page 1, line 3, after "employment" insert in roman "except actions based upon a written contract".

and when so amended that said bill do pass.

(Reference is made to printed bill dated February 4, 1977.)

CARROLL, Chairman

Committee report adopted.

(SEAL) Journal of the Senate

State of Indiana

Once-Hundredth Genger Assembly *First Regular Session*

Fifty-fifth Session Day Thursday Morning March 31, 1977

The Senate convened at 10:30 a.m., with the President of the Senate, Robert D. Orr, in the chair.

Prayer was offered by Father Anthony Molnar, of St. Margaret's Hospital, Hammond.

The pledge of allegiance was led by Senator Mathias Karger.

The Chair ordered the roll of the Senate to be called. Those present were:

Augsburger	Mahern
Borst	McCormick
Bosma	McDaniel
Bruggenschmidt	Miller
Bushemi	Mills
Carroll	Muts
Carson	Neary
Christy	Niemeyer
Duvall	O'Bannon
Edwards	O'Day
Fair	Peterson
Fanning	Piper
Garten	Richard
Gary	Shank
Gubbins	Sinks
Guy	Snowden
Hall	Spurgeon
Harris	Stanley
Harrison	Swisher
Hunt	Teagu
Jessup	Tipton
Kerger	Townsend
Kovach	Ullrich
Larson	Wheeler
Lewis	

The Chair announced a quorum present.

Pursuant to Senate Rule 4(c), no motion having been heard the Journal of the previous day was considered read.

HOUSE BILLS ON SECOND READING

The following bills were called up by their respective sponsors, were read a second time by title and, there being no amendments, were ordered engrossed:

Engrossed House Bills 1021, 1030, 1052, 1141, 1151, 1285, 1300, 1335, 1384, 1391, 1392, 1425, 1469, 1561, 1563, 1607, 1658, 1664, 1688, 1881, 1897, 1925, 1926, 1957, 1970, 1977, 1979, 1983, 2006, 2016, 2044, 2054, 2077, 2086, 2102, 2172

Senator Townsend called up House Bill 1134 for second reading. The bill was read second time by title.

April 5, 1977

Engrossed House Bill 1925

Senator Duvall called up Engrossed House Bill 1925 for third reading:

A BILL FOR AN ACT to amend IC 34-1-2 concerning the limitations on actions.

The bill was read third time by sections and placed upon its passage. The question was, Shall the bill pass? The roll was called.

Roll Call 629: Yeas 34, nays 7.

The bill was declared passed. The question was, Shall the title of the bill remain the title of the act? There being no objection, it was so ordered.

The Chair instructed the Secretary to inform the House of the passage of the bill.

April 7, 1977

MESSAGE FROM THE SENATE

Mr. Speaker: I am directed by the Senate to inform the House that the Senate has passed Engrossed House Bills 1034, 1041, 1134, 1300, 1314, 1362, 1391, 1405, 1721, 1725, 1758, 1925, 1926, 1948, 1957, 1970, 2006, 2054 and 2145 with amendments and the same are herewith returned to the House for concurrence.

MARY LAUCK
Secretary of the Senate

April 7, 1977

HOUSE MOTION

Mr. Speaker: I move that the House concur in Senate amendments to House Bill 1925.

COLDREN

Motion prevailed.

April 7, 1977

MESSAGE FROM THE HOUSE

Mr. President: I am directed by the House to inform the Senate that the House has concurred in the Senate amendments to Engrossed House Bills 1278, 1524, 1925, 1977, 1789, 1757, 1634, 1479, 1885, 1481, 1767.

SHARON THUMA
Clerk of the House

April 26, 1977

Signings

The Speaker announced that he had signed House Enrolled Acts 1003, 1925, 1151, 1390, 1141, 2172.

[SEAL] **Journal of the Senate**

State of Indiana

One-Hundredth General Assembly

First Regular Session

Sixty-first Session Day Saturday Morning April 30, 1997

The Senate convened at 10:00 a.m., with the President of the Senate, Robert D. Orr, in the chair.

Prayer was offered by the Reverend Robert Ford, Associate Pastor of Indianapolis Baptist Church, Indianapolis.

The pledge of allegiance was led by Senator John Larson.

The Chair ordered the roll of the Senate to be called. Those present were:

Augsburger	Mahern
Borst	McCormick
Bosma	McDaniel
Bruggenschmidt	Miller
Bushemi	Mills
Carroll	Muts
Carson	Neary
Christy	Niemeyer
Duvall	O'Bannon
Edwards	O'Day
Fair	Peterson
Fanning	Piper
Garten	Richard
Gary	Shank
Gubbins	Sinks
Guy	Snowden
Hall	Spurgeon
Harris	Stanley
Harrison	Swisher
Hunt	Teagu
Jessup	Tipton
Kerger	Townsend
Kovach	Ullrich
Larson	Wheeler
Lewis	Wilson

The Chair announced a quorum present.

Pursuant to Senate Rule (4c), no motion having been heard the journal of the previous day was considered read.

PUBLIC LAW NO. 328

[H. 1925. Approved April 26, 1977.]

AN ACT to amend IC 34-1-2 concerning the limitations on actions.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 34-1-2 is amended by adding a NEW section 1.5 to read as follows: Sec. 1.5. All actions relating to the terms, conditions, and privileges of employment except actions based upon a written contract (including, but not limited to, hiring or the failure to hire, suspension, discharge, discipline, promotion, demotion, retirement, wages, or salary) shall be brought within two (2) years of the date of the act or omission complained of.

Supreme Court, U.S.
FILED
OCT 25 1996
CLERK

No. 96-467

In The

Supreme Court of the United States

October Term, 1996

JERRY JONES, ET AL.,

Petitioners,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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19 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioners have waived any argument that *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1986), upon which the District Court and Seventh Circuit Court of Appeals relied, is inconsistent with this Court's decision in *International Union, United Auto Workers of America v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S. Ct. 1107, 16 L. Ed. 2d 192 (1966), and should thus be overturned since no such argument was made below by the Petitioners.

2. Whether the Petition for Writ of Certiorari should be denied where Petitioners have not shown any inconsistency between the Seventh Circuit Court of Appeals' Opinion Below and its decision in *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1986), and this Court's decision in *International Union, United Auto Workers of America v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S. Ct. 1107, 16 L. Ed. 2d 192 (1966) and whether the writ should be denied even if a purported conflict existed.

3. Whether the Petition for Writ of Certiorari should be denied where Petitioners have not shown any inconsistency between the Seventh Circuit Court of Appeals' opinions in *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1986), and in *Anderson v. Flexel, Inc.*, 47 F.3d 243 (7th Cir. 1995) and whether the writ should issue even if such a conflict existed.

LIST OF ALL PARTIES TO THE PROCEEDINGS

General Electric Company itself has common stock and debt securities which are publicly traded. General Electric Company also has a number of subsidiaries in the United States and elsewhere. There are, however, only a limited number of these subsidiaries which have any outstanding equity or debt securities which are publicly held.

Those with publicly-held equity securities are:

- CAMCO, Inc. (Canada)
- General Electric Capital Corporation (formerly General Electric Credit Corporation)
- Montgomery Ward & Co., Incorporated
- Nuovo Pignone (Italy)

Those which have only publicly-held debt securities are:

- Credit DeL'Est
- Finax FS AB
- Finax KK AB
- GE Capital Aviation Services, Ltd.
- GE Capital Mortgage Services, Inc.
- GE Capital (NZ) Ltd. (New Zealand company)
- GE Capital PTY LTD. (Australian company)
- GECC Financial Corporation (Hawaii)
- GNA Corporation

LIST OF ALL PARTIES TO THE PROCEEDINGS – Continued

- Gate Finance Corporation
- General Electric Capital Canada, Inc.
- General Electric Capital Services, Inc. (formerly General Electric Financial Services, Inc.)
- General Electric Credit International, N.V.
- Imaging Financial Services, Inc. (formerly Eastman Kodak Credit Corp.)
- International GE Capital Corporation
- Mercur Bank (Austria)
- Service Bank GmbH

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, case number 95-2281, is reported at 87 F.3d 209 and is reproduced in Petitioners' Appendix ("App.") at page 2. The opinion of the United States District Court for the Northern District of Indiana, case number 1:95-CV-11-AS, is unreported and is reproduced in Petitioners' Appendix at page 13.

BASIS FOR JURISDICTION

Petitioners have correctly stated the grounds on which they seek to invoke the jurisdiction of this Court.

STATUTES INVOLVED

The state statutes involved are IND. CODE § 34-1-2-1.5 and IND. CODE § 34-1-2-2(6), and these statutes are correctly set forth in the Petition and reproduced in Petitioners' Appendix at page 19.

STATEMENT OF THE CASE

On January 11, 1995, petitioners filed suit under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, a statute which provides the basis for federal jurisdiction for violations of collective bargaining agreements entered into between labor unions and employers engaged in interstate commerce. In the Complaint, plaintiff, Jerry Jones as representative of a class of

plaintiffs and as a member of a union, alleged no pendent state claims but only a violation of his contractual rights under the collective bargaining agreements between the unions, United Electrical Radio and Machine Workers of America ("UE") and International Electrical Radio and Machine Workers of America ("IUE"), and the defendant General Electric Company ("GE").

In his Complaint, Jones alleged that he was a member of the United Electrical Radio and Machine Workers of America ("UE") while employed at GE's plant in Decatur, Indiana, and that he was employed under a collective bargaining agreement which was in effect from June 27, 1988 through 1991. When, in 1989, the Decatur plant closed permanently, Jones and other employees were transferred to GE's Fort Wayne, Indiana, plant where they became members of the International Electrical Radio and Machine Workers of America ("IUE") and were employed under a collective bargaining agreement between GE and the IUE.

Jones further alleged that GE breached the collective bargaining agreements under which he was employed with respect to his seniority and service credits when he was transferred to GE's Fort Wayne, Indiana, plant following the closure of its Decatur, Indiana, plant. Jones also alleged that he was told he would have certain seniority and service credit rights which he alleged did not come about and that GE misrepresented what his seniority and service credit rights would be after he was transferred. Lastly, Jones alleged in the Complaint that he pursued the grievance procedure as required by the parties' collective bargaining agreements and that he exhausted all grievance resolution procedures as set forth

therein. Jones did not allege in the Complaint the existence of any other written contract between the parties other than the collective bargaining agreements. Moreover, Jones failed to sue the unions or allege a breach of the unions' duty of fair representation which they owed to him.

General Electric filed a Motion to Dismiss on the grounds that the Complaint was fatally deficient in that Jones failed to name the unions and allege a breach of their duty of fair representation as required under section 301. In the alternative, GE argued that Jones's Complaint was untimely as it was filed more than six months after his cause of action arose. In its reply brief, GE also argued, in the alternative, the application of a two-year statute of limitations which the trial court applied in dismissing the Complaint. Jones conceded that his Complaint was time-barred if either the six-month or two-year statutes applied, but argued instead in favor of a ten-year statute of limitations.

The United States District Court for the Northern District Of Indiana, Fort Wayne Division, following the Seventh Circuit's decision in *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1986), held that Indiana's two-year statute of limitations for employment-related actions applied to the cause of action rather than the ten-year statute of limitations urged by Jones. Thus, the action was time-barred. On Jones's appeal to the United States Court of Appeals for the Seventh Circuit, the court affirmed the district court's decision holding that despite the fact that Indiana's two-year statute of limitations for employment related actions

exempted actions based upon written contracts, it remained the most analogous state statute of limitations.

ARGUMENT

THE PETITION SHOULD BE DENIED SINCE PETITIONERS HAVE PRESENTED NO COMPELLING REASONS FOR REVIEW

The decision of the Court of Appeals in the present case is correct, and Petitioners present no compelling reason for issuing the writ. The decision of the Seventh Circuit breaks no new ground in interpreting any issue of federal law, and has not been shown by petitioners to be inconsistent with any decision of this Court or any decision of any other federal court of appeals. Thus the petition should be denied. *See* SUP. CT. R. 10 (setting forth the considerations governing review on certiorari). Moreover, the questions presented by petitioners are ones which have no significance beyond the State of Indiana, and, at bottom, fundamentally involve an interpretation of state law; namely, the resolution of an Indiana statute of limitations issue. Accordingly, a less likely candidate for certiorari could scarcely be imagined.

A. The Errors Claimed by the Petitioners Were Waived, and Petitioners Have Proffered No Compelling Reasons for Review.

It is well-settled that where an argument is not presented to a court of appeals, but is presented for the first time in this Court, this Court will almost invariably decline to consider it. *See, e.g., DeShaney v. Winnebago*

County Department of Social Services, 489 U.S. 189, 195 n.2, 109 S.Ct. 998, 103 L. Ed. 2d 249 (1989); *Kosak v. United States*, 465 U.S. 848, 850 n.3, 104 S. Ct. 1519, 79 L. Ed. 2d 860 (1984). Moreover, in the present case, although petitioners now assert that the Seventh Circuit misconstrued *International Union, United Auto Workers of America v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S. Ct. 1107, 16 L. Ed. 2d 192 (1966), the petitioners failed to cite, let alone discuss, *Hoosier Cardinal* in either of their briefs in the Court of Appeals. Hence, any question as to whether the Seventh Circuit correctly applied *Hoosier Cardinal* was not preserved in the lower court in such a fashion as would justify this Court's intervention. Moreover, since petitioners do not even assert a conflict between the opinions of the Seventh Circuit and any ruling of *any* other court of appeals, no one but the petitioners has ever claimed that the opinion relied upon by the Seventh Circuit, *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1986), is in conflict with *Hoosier Cardinal*. Thus the claimed error which, as discussed *infra* is no error, hardly presents a compelling reason for this Court to grant certiorari.

B. The Petitioners, In Erroneously Alleging an Intra-Circuit Conflict and a Conflict Between the Seventh Circuit and This Court, Put Forth No Compelling Reason for Review.

1. Although Petitioners Allege a Conflict Between the Seventh Circuit and This Court, No Such Conflict Is Present and, Even Assuming the Presence of Such a Conflict, No Compelling Reason for Review Has Been Presented.

Petitioners here misstate the holding of the Court of Appeals in this case, claiming that the court "has extrapolated [the] reasoning of *Hoosier Cardinal* to conclude that for purposes of the Indiana employment related claims statute, which expressly excepts out written contracts, a collective bargaining agreement is not a written contract." Petition for Writ of Certiorari at 7. However, in this case, the Court of Appeals actually held that in a case such as this, where the only written contract upon which the claim is based is a collective bargaining agreement, the action "is not entirely based on a written contract." *Jones*, 87 F.3d at 212 (App. at 8) (quoting *Home Elevator*, 798 F.2d at 230 & n.9). Such a holding is entirely consistent with *Hoosier Cardinal* since therein this Court held that

> [p]roof of the breach and of the measure of damages, however, both depend upon proof of the existence and duration of *separate employment contracts between the employer and each of the employees*. Hence this § 301 suit may fairly be characterized as one not exclusively based upon a written contract.

Hoosier Cardinal, 383 U.S. at 1114 (emphasis added).

Precisely the same circumstances are presented here. Petitioners did not plead that this action was based entirely on a written contract. In the Complaint, Jones avers that when he transferred to another plant he did not receive the benefits that he was "told" he would receive. *Jones*, 87 F.3d at 212 (App. at 8). These facts fall squarely within the confines of *Hoosier Cardinal* and *Home Elevator*. As set forth in the Seventh Circuit's opinion, the only substantive argument advanced by petitioners (and advanced belatedly) that *Home Elevator* was distinguishable (*id.* at 212-13 (App. at 8-10)) is unpersuasive because Petitioner failed to plead a separate written contract between himself and GE. But the question of whether one decision of the Seventh Circuit can be distinguished from another decision of the Seventh Circuit is one which falls far below this Court's threshold for certiorari, and would be so fact-based as to vitiate the requirement that the focus of the writ be upon issues of overriding national importance.

Jones argued that a letter written to a co-worker which he may have received constitutes a written contract entitling him to a ten-year statute of limitation. In specifically addressing this argument, the Seventh Circuit found that *none* of the elements for a written employment contract as required under Indiana law were present. *Id.* at 213 (App. 9-10). Indiana law requires a contract of employment to contain four items: 1) the place of employment; 2) the period of employment; 3) the nature of the service the employee is to render; and 4) the compensation the employee is to receive. *Majd Pour v. Basic Am. Medical, Inc.*, 512 N.E.2d 435, 439 (Ind. Ct. App.

1987) (App. p. 9). Thus the decision of the Seventh Circuit presents no conflict with the decisions of this Court.

As the Court of Appeals observed, the facts of this case are "very similar to *Home Elevator.*" *Id.* (App. at 8). In *Home Elevator,* the Seventh Circuit concluded in that a section 301 action in which "the basic allegation . . . is that a company breached the collective bargaining agreement," *Home Elevator,* 798 F.2d at 227, the two-year Indiana statute would apply, since such an action is not entirely based on a written contract, *id.* at 230 & n.9. Petitioners in this case sought to distinguish *Home Elevator,* but did not seek to have the Seventh Circuit overrule it. *Jones,* 87 F.3d at 212 (App. at 8). However, before this Court, the petitioners argue that *Hoosier Cardinal* is inconsistent with *Home Elevator* and, in effect, seek a ruling overturning *Home Elevator,* although no challenge to *Home Elevator* was presented in the Seventh Circuit. As noted above, an argument not raised in the lower court is generally waived.

Moreover, as recently noted by several members of this Court,

> in the present day federal court system, where review by this Court is almost entirely discretionary, a different regime [from where there is an appeal as of right] prevails. We receive nearly 7,000 petitions for certiorari every Term, and can grant only a tiny fraction of them. A high degree of selectivity is thereby enjoined upon us in exercising our certiorari jurisdiction, and our Rule 10 embodies the standards by which we decide to grant review. One of the reasons contained in Rule 10.1(a) is the existence of a conflict between one court of appeals and another.

> The negative implication of this ground, borne out time and again in our decisions to grant and deny certiorari, is that *ordinarily a court of appeals decision interpreting one of our precedents – even one deemed to be arguably inconsistent with it – will not be reviewed unless it conflicts with a decision of another court of appeals.* This fact is a necessary concomitant of the limited capacity in this Court.

Hubbard v. United States, ___ U.S. ___, ___, 115 S. Ct. 1754, 131 L. Ed. 2d 779, 798 (1995) (Rehnquist, C.J., dissenting) (emphasis added). Thus, even if the Seventh Circuit had misapplied the precedent of this Court, such a misapplication does not present a "compelling" reason to grant the petition since petitioners have not alleged that the Seventh Circuit's decision below is in conflict with any other decision of its sister circuits. Accordingly, the Petition for Writ of Certiorari should be denied.

2. Although Petitioners Allege a Conflict Within the Seventh Circuit, No Such Conflict Is Present And, Even Assuming the Presence of Such a Conflict, No Compelling Reason for Review Has Been Presented.

In their Petition for Writ of Certiorari, the petitioners allege that the Seventh Circuit erred in applying *Home Elevator* and, in doing so, created an intra-circuit conflict. However, as the Seventh Circuit pointed out in the opinion below, the result reached in this case is identical to the rule which has prevailed in such actions in the federal courts in Indiana for ten years. *Jones*, 87 F.3d at 212 (App.

at 8). Hence, the petitioners could not and do not maintain that the application of a two-year statute of limitations in this case – a period of limitations which the Seventh Circuit has applied to such actions since *Home Elevator* – presented them with any sudden or surprising change in the governing law.

Indeed, the petitioners' assertion to this Court that the Seventh Circuit erred in applying *Home Elevator* and was *required* to apply a ten-year Indiana statute of limitations in such actions (as the court did in *Anderson v. Flexel, Inc.*, 47 F.3d 243 (7th Cir. 1995)) is even less persuasive given the utter lack of equity underlying the petitioners' position. In *Home Elevator*, the Seventh Circuit concluded that a two-year statute of limitations was "consistent with federal labor disputes and contractual agreements to submit grievances to arbitration." *Jones*, 87 F.3d at 212 (App. at 8) (citing *Home Elevator*, 798 F.2d at 230 & n.9). Petitioners do not even venture an explanation as to why the application of a ten-year statute of limitations would further federal labor policy or otherwise further an equity other than the petitioners' own particular position. Petitioners obliquely concede that this Court in *Hoosier Cardinal* did take into consideration the policy of timely resolution of labor relations claims and acknowledged that Indiana's statute of limitations for a written contract was not applied by this Court in *Hoosier Cardinal* because the statute "was seemingly too lengthy to fulfill the policies behind labor relations claims." (Petition at p. 7).

Although the Seventh Circuit's opinion demonstrates the applicability of *Home Elevator*, the petitioners challenge this application stating that it is inconsistent with

the Seventh Circuit's later holding in *Anderson v. Flexel, Inc.*, 47 F.3d 243 (7th Cir. 1995). Leaving aside for the moment the question of whether such inconsistency presents a compelling reason to review the lower court decision, it must be noted first that there is no inconsistency. As set out above, the court found the facts in *Jones* to fall within the confines of *Home Elevator*. Later in the opinion, the Court of Appeals specifically addressed the inconsistency argument and distinguished *Anderson* on two grounds. First, *Anderson* was not a section 301 action; it was an ERISA action. Second, the contract at issue in *Anderson* was a life insurance contract, "much more substantial than the one-page clarification letter" Jones offered. *Jones*, 87 F.3d at 213. The Petitioners present no new argument here and advance no reason why this Court should grant Petitioners' petition.

Moreover, even if this Court were to find an inconsistency between opinions in the Seventh Circuit, such an inconsistency would not present the type of issue on which this Court would routinely exercise its very limited jurisdiction. As noted by Justice Frankfurter, the Court must be

> consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is important to the public as distinguished from that of the parties, *and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.*

Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 385 n.1, 69 S.Ct. 606, 93 L. Ed. 741 (1949) (Frankfurter, J., dissenting) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*,

261 U.S. 387, 393, 43 S.Ct. 422, 67 L. Ed. 712 (1923)) (emphasis added). There is no conflict between the circuits, merely a claimed conflict between two opinions in the same circuit. Especially considering the fact that there is no conflict, the petitioners have presented no compelling reason for the exercise of this Court's jurisdiction. Accordingly, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The petitioners argue that the extraordinary exercise of this Court's jurisdiction is justified for several reasons. However, the reasons presented are not compelling. First, petitioners argue error which was not raised in the lower courts and is thus waived. Next, the petitioners argue that the Seventh Circuit's decision conflicts with both an opinion of this Court and a Seventh Circuit opinion. However, none of these alleged conflicts exist and, even assuming they did, the conflicts are not of the type which would justify this Court's exercise of its jurisdiction. For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted this 25th day of October, 1996.

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